

application as it had in its Odessa and Portland Assignment applications.

19. Section 2(j) of the WTGI-TV Purchase Agreement specifically provided, in pertinent part, that:

[s]hould the Commission not grant [NMTV] a waiver of section 73.3555 of its rules and regulations, or authorize the assignment of the above listed station, for whatever reason, then this agreement shall automatically become null and void and the parties shall be released from any and all obligations of the other whatsoever.

20. On May 10, 1991 a Petition To Deny the WTGI-TV Assignment was filed by Dan Borowicz, the chief engineer of WTGI-TV. Among the allegations made was a charge that NMTV did not comply with Commission rule 73.3555(d), and that it was a "sham" corporation for Trinity because, inter alia, NMTV's minority directors took no part in the day-to-day management of the station. The petition also supported its allegations by reference to facts which were well known to the Commission--i.e., that: Mrs. Duff and Dr. Crouch worked for Trinity; NMTV was a program affiliate of Trinity's; and, NMTV and Trinity used the same engineer and attorney. The pleading cycle was finally ended on July 2, 1991, after numerous requests for extensions and a motion to accept a late filing were submitted by Mr. Borowicz. Subsequently, on September 13, 1991, the Chief of the Video

management, and a detailing of its relationship with the Trinity Broadcasting Network. The Commission's inquiry was extremely broad ranging, delving into NMTV's minority directors' personal history, its corporate method of decision-making, and other subjects that were far afield of whether NMTV was a validly formed corporation, and whether its directors or owners were properly elected and qualified.⁷

21. NMTV promptly responded to the Bureau's request on September 24, 1991. Unfortunately, before any response or ruling could be issued by the Commission the Purchase Agreement between NMTV and Delaware Valley expired on October 1, 1991.⁸ Accordingly, on September 30, 1991 the Bankruptcy Court issued an order which stated that effective October 1, 1991 the contract regarding the sale of WTGI-TV to NMTV was expired and voided.

NMTV's application was therefore dismissed on October 1, 1991 as moot.

22. The Commission has not yet acted on the allegations raised in the petition to deny the WTGI-TV assignment. Without a resolution of these issues NMTV cannot realistically hope to seek to acquire other broadcast facilities pursuant to section 73.3555(d). Accordingly, Declaratory Relief is appropriate under Commission 1.2.

II. Questions Presented

23. NMTV respectfully requests Declaratory Relief and answers to the following questions in order to ensure complete compliance with the Commission's rules, and to resolve the staff's apparent uncertainty concerning the meaning and application of 73.3555(d) issues raised in the WTGI-TV assignment:

- (1) to qualify under rule 73.3555(d) as "more than 50 percent owned by one or more members of a minority group" must an applicant provide evidence beyond a showing that the legal owners of the applicant are qualified minorities, i.e., such as evidence of participation in the day to day management of the corporation or the advocacy of programs and policies uniquely relevant to minority groups?
- (2) If the answer to question one is negative, does minority-control, as used in section 73.3555(d)(3)(iii) prohibit a nonminority-controlled corporation from assisting and/or relating to the minority owned licensee corporation in the following ways:

- (a) entering into a program affiliation agreement;
- (b) loaning funds at favorable rates;
- (c) sharing common officers;
- (d) using common employees;
- (e) having salaried employees of the nonminority-controlled corporation as principals of its minority-owned corporation; and,
- (f) having substantially similar or even identical benefit plans, personnel practices and other operational similarities?

III. Supporting Legal Arguments

A. NMTV is a Properly Qualified Corporation and its Directors Qualify as "Owners" as Set Forth in 73.3555(d)(3)(iii).

24. As noted above, NMTV has been in existence and in good standing for over 11 years. Its board of directors have been remarkably stable over its period of existence, and it had the same directors for ten years. Indeed, since its incorporation, it has lost only one director, and two new directors have been added. Its organic documents provide that the corporation is controlled by its board of directors, with each director having one vote, and that the board of directors are self-perpetuating.

25. Accordingly, even though NMTV is a nonprofit organization and no one owns any equity in the corporation, for legal purposes its directors are its "owners." This accords with traditional Commission policy. "The key distinguishing attribute

of an organization with a self-perpetuating board is that the governing board is the sole locus of control; such a board lacks even the limitation of an underlying voting body on its control that theoretically exists over the boards of membership organizations and governmental entities." Notice of Inquiry in MM Docket No. 89-77, 54 Fed. Reg. 15957, 15964 (1989). Cf., Roanoke Christian Broadcasting, Inc., 52 Rad. Reg. 2d (P&F) 1725, 1727 (Rev. Bd. 1983), rev. denied FCC 83-441 (released September 27, 1983). As stated in North Land Communication, 100 F.C.C.2d 914, 58 Rad. Reg. 2d (P&F) 825, 828, n.3 (Rev. Bd. 1985), "directorships of a non-stock licensee ... equat[e] with ownership," citing Roanoke Christian Broadcasting, Inc. See also, Farragut Television Corp., 8 F.C.C.2d 279, 10 Rad. Reg. 2d (P&F) 50, 54 (1967) (the Commission recognizes that "individuals holding positions of personal interest and responsibility in nonstock corporate applicants have been treated by the Commission as participating owners").

26. In creating the minority exception under section 73.3555(d) the Commission was very clear in strictly equating "minority control" with minority legal ownership. Specifically, rule 73.3555(d) provides, in pertinent part, as follows:

- (d)(1) No licensee for a commercial AM, FM or TV broadcast station shall be granted, transferred or assigned to any party (including all parties under common control) if the grant, transfer, or assignment of such license would result in such party or any of its stockholders, partners,

members, officers or directors, directly or indirectly, owning, operating, or controlling, or having a cognizable interest in, either:

- (i) more than fourteen (14) stations in the same service, or
 - (ii) more than twelve (12) stations in the same service which are not minority controlled.
- (d)(2) No licensee for a commercial TV broadcast station shall be granted, transferred or assigned to any party (including all parties under common control) if the grant, transfer, or assignment of such license would result in such party or any of its stockholders, partners, members, officers or directors, directly or indirectly, owning, operating, or controlling, or having a cognizable interest in, either:
- (i) TV stations which have an aggregate national audience reach exceeding 30 percent, or
 - (ii) TV stations which have an aggregate national audience reach exceeding 25 percent which are not minority controlled.

(d)(3) For purposes of this paragraph:

. . . .

- (iii) "Minority-controlled" means more than fifty (50) percent owned by one or more members of a minority group.
- (iv) "minority" means Black, Hispanic, American-Indian, Alaskan Native, Asian and Pacific Islander.

The Commission's black letter rule equates "control" with "ownership." There is no requirement for integration of ownership into management, no mention of minority programming.

The rule and its accompanying notes are bereft of any mention of any other legal requirement other than the organization be "minority-controlled"--which is specifically defined and limited to be "more than 50 percent owned by one or more members of a minority group." In the context of a nonprofit/nonstock organization with a self-perpetuating board that standard is met when the voting directors of the corporation are members of a qualified minority group.

- B. In Adopting the Minority Ownership Exception to the Multiple-Ownership Rule (Rule 73.3555(d)) the Commission Established a Different Standard for

In the context of the Multiple Ownership Rules, however, the focus of the Commission's concern was on the inability of minority owners to obtain financing. Specifically, the Commission stated at paragraph 93 "that the major barrier to increased minority ownership is the unavailability of adequate financing." In paragraph 94 the Commission went on to more fully enunciate its concern with regard to enhancing minority ownership in its relaxation of the Rule of Seven as follows:

In conclusion, we believe it is the availability of adequate financing for station acquisition that is of crucial importance to prospective minority owners. Therefore, the appropriate focus of our efforts is to promote the availability of financing to minorities on equal terms as all other owners. If it is, then minorities will be on an even footing with others in bidding for stations at market prices. If such financing is not made available to minorities, then they will remain largely unable to purchase stations, either at yesterday's prices, today's high prices, or the hypothetically higher prices following relaxation of the Rule of Sevens. Minorities per se are no more disadvantaged by marketplace prices than any other small would-be owners, if financing can be made available through Commission actions, the marketplace prices can be paid. If financing is unavailable, then it makes little difference how high marketplace prices go. It would be inappropriate for the Commission to retain or adopt rules in order to deflate market prices

national multiple-ownership rules were not primarily intended to function as a vehicle promoting minority ownership in broadcasting. However, since the financing of station

This is precisely the standard finally incorporated in rule 73.3555(d)(3)(iii).⁹ NMTV's directors, which under its charter documents are the only members of the corporation and which control the corporation by their affirmative votes, comply with these rules and policies.

29. A review of NMTV's record shows that the minority incentive memorialized in 73.3555(d) is working exactly as the Commission intended. Is there any doubt, but for the minority incentive of the Commission's rules, that Mrs. Jane Duff, Rev. Philip Aguilar and Rev. E.V. Hill would not be principals of a broadcast entity which once owned two television stations? But for section 73.3555(d), how likely is it that a minority controlled corporation like NMTV would be the licensee of a station in Portland, one of the top 30 television markets with an extremely low percentage of minorities? Is there any minority controlled organization which owns two or more full power television stations which does not rely on a larger organization

9/ Moreover, this same standard for minority-control in order to obtain a preference in LPTV/television translator lotteries is found in FCC Form 346, Section V, Minority Preference, Instruction 3.c., viz:

Unincorporated associations and nonstock corporations with members. If a majority of the members are minorities, the entity is entitled to a minority preference.

The standard set forth in FCC Form 346 was mandated by statute, 47 U.S.C. § 309(i)(3)(A).

or national network for construction financing and a majority of its programming through program affiliation agreements?¹⁰

30. The Commission specifically narrowed the definition of "minority-controlled" to be "minority-ownership" in its Multiple-Ownership - Seven Stations Rule for two reasons. The first is that increasing minority involvement in broadcasting was not a primary purpose for the rules. The second is that the Commission was addressing a single issue--increasing minority ownership which it perceived could be cured with additional financing, rather than other issues such as minority programming, which could require minority integration into the day-to-day operation of the stations' facilities. The purposes to be served by the exception to the multiple ownership rule were limited and much narrower than the policies which the Commission attempted to promote in its previous pronouncements regarding incentives to increase minority ownership and operation of broadcast facilities. For example, in its Statement of Policy on Minority Ownership of Broadcasting Facilities, supra, the Commission set forth for the first time its policy regarding tax certificates and distress sales. The language used throughout the Statement of Policy on Minority Ownership of Broadcasting Facilities makes it clear that the Commission was attempting to increase minority ownership as a

ming. and the diversity of broadcast voices. "Ownership" was

[footnote deleted] to applicants with a significant minority ownership interest, assuming the proposed assignee or transferee meets our other qualifications. 42 Rad. Reg. 2d (P&F) 1695.

No such similar conjunctive requirements exists under rule 73.3555(d), or in the Multiple Ownership--Seven Stations Rule Reports and Orders. Minority ownership in the multiple-ownership rules is seen as an end in itself.

31. The absence of this conjunctive requirement represents a reasoned Commission judgment on the burden to be allocated to the applicant before the applicant is eligible for a monetary benefit. In the instance of the multiple-ownership rules, the benefit offered minority owners is simply the waiver of the Commission's rules. With respect to the tax certificate and distress sale rules the government is conferring a financial benefit on minorities. in effect a subsidv. to assist the

effect of reducing the tax liability the seller would otherwise have had to pay on a full value sale versus a distress sale.

32. Since these policies involve a direct government subsidy or benefit the Commission may require that a higher standard of proof is necessary to show entitlement to the benefit. The government is effectively underwriting programs and costs at taxpayer expense for the highly laudable goal of increasing minority ownership and minority management and programming. In the case of rule 73.3555(d) no such direct benefit is conferred, so less is required. Only ownership is required. In this way the important goal of increasing minority ownership is fostered, without the more onerous requirement of minority management and programming.

33. Moreover, requiring a standard higher than mere ownership may work at cross purposes with the ostensive reason for the rule--to increase the availability of capital for minority station acquisition. Rule 73.3555(d) encourages exclusively private investment to further minority ownership of broadcast facilities. Private financing would be chilled if the Commission required that entitlement for the waiver required certain management involvement or a specific program format. Moreover, to remove any ambiguity which may have existed between a comparison of the requirements specified in Statement of Policy on Minority Ownership of Broadcasting Facilities, supra,

supplemented, ____ F.C.C.2d ____, 52 Rad. Reg. 2d (P&F) 1301 (1982), and the purposes in the multiple-ownership rules, the Commission specifically defined "minority-controlled" in rule 73.3555(d) as "minority-ownership." Indeed, the application of this interpretation in this manner is the only one which is

the industry, and in this case has essentially paralyzed NMTV from proceeding with any future plans to acquire and construct new facilities, clarification is necessary.¹²

C. Trinity's Assistance to and Relationship With NMTV Does Not Constitute "Legal Control" of NMTV Within the Meaning of Section 73.3555(d).

36. The record is clear that NMTV is a validly qualified, existing and functioning corporation. As noted above, NMTV has

12/ A clear example of the Commission's policy changes and clarifications involve the use of limited partnerships. In the 1978 Statement of Policies on Minority Ownership of Broadcasting Facilities, limited partnership were not specifically contemplated. In its 1982 Supplement (52 Rad. Reg. 2d (P&F) 1301), the Commission noted that tax certificates and distress sales could be awarded to limited partnerships which had minorities as general partners, provided such minorities owned no less than 20 percent of the equity, and in fact operated as general partners with full operational control. As the use of limited partnerships became more popular in the pursuit of initial broadcast licenses, the Commission further clarified that the other media holdings of limited partners would not be assessed against the partnership provided the standards established by the Uniform Limited Partnership Act were met. Multiple Ownership Rules, 97 F.C.C.2d 997, 55 Rad. Reg. 2d (P&F) 1465 (1984). Following that assessment, it became clear that certain of the "safe harbor" provisions under the Uniform Limited Partnership Act, which permitted limited partners to act on behalf of the limited partnership, permitted limited partners to have too much management involvement to fully award complete integration credit. Accordingly, in its Ownership Attribution, ___ F.C.C.2d ___, 58 Rad. Reg. 2d (P&F) 604 (1985), the Commission stated that in order to fully insulate limited partners under the diversification and integration criterion of the standard comparative issue, all limited partners had to agree not to act on behalf of the partnership, or be employed by the partnership. Even following these clarifications, however, the policy appeared to remain in flux. In Independent Masters, Limited, 104 F.C.C.2d 178, 60 Rad. Reg. 2d (P&F) 835 (1986) the Review Board awarded a 100 percent minority integration credit to a limited partnership which had a minority partner who owned only 10 percent of the equity, even though the Commission had previously established a minimum 20 percent ownership requirement.

its own federal income tax exemption, and is tax exempt in three different states. NMTV owns its own assets, and has its own revenue, both from an affiliation agreement with Trinity and from the sale of program time and production facilities. NMTV pays its own taxes and prepares and files its own tax returns. NMTV has its own employees, who are hired, fired and paid by NMTV. NMTV is a legally separate corporation and it has not now nor ever has been a subsidiary of or legally controlled by Trinity Broadcasting Network.

37. NMTV does not deny, however, that it has longstanding and pervasive ties with Trinity, as outlined here, and as more fully outlined in NMTV's Response. Among those ties include the fact that NMTV received financing for its station acquisition from Trinity at favorable interest rates (e.g., 5 percent). As noted, in the WTGI-TV assignment, Trinity agreed to provide construction financing, and entered into an affiliation agreement with NMTV under which a portion of the revenues under the affiliation agreement would pay off NMTV's debt, and which used the equipment at NMTV's station as security. NMTV and Trinity have a program affiliation agreement with respect to KNMT-TV, Portland, Oregon, and formerly had such an agreement with respect to NMTV's Odessa station, KMLM-TV. Although Trinity does not have legal control of NMTV's board, most of NMTV's directors have some connection with Trinity in one form or another. Dr. Crouch

is the president of Trinity. Mrs. Duff is the assistant to Mr. Crouch in managing Trinity and is a salaried employee of Trinity. Rev. Aguilar, while he is the pastor of a separate church, has had a cooperative relationship with Trinity, uses Trinity property at little or no cost, and receives reimbursement from Trinity for various services provided to Trinity by Rev. Aguilar's Set Free Ministries. Dr. Hill has been a guest on Trinity programming, and occasionally Trinity helps Dr. Hill raise funds for the soup kitchens his church runs in Watts. Moreover, salaried Trinity employees constitute the remainder of NMTV's corporate officers. Many of NMTV's agents, such as its communications counsel and broadcast consulting engineer, also serve in similar capacities for Trinity.

38. Despite this acknowledged record of close ties, however, there is no fact which contradicts the essential fact that NMTV maintains a separate corporate and legal existence from Trinity, complies in all respects with federal and state law, and functions as a separate corporation.

39. For example, while NMTV receives construction financing from Trinity on favorable rates, there is no evidence that NMTV's obligation to Trinity is illusory. For example, there is no acceleration clause or other limiting clause if NMTV chooses to change its program format. The obligation is secured by NMTV's station equipment, but the financing arrangement gives Trinity no

debentures, no voting power or voting rights, nor does the financing agreement, in any way, affect the legal independence of NMTV. See, for example, James R. Serra, ____ F.C.C.2d ____, 42 Rad. Reg. 2d (P&F) 73 (1977); Wisconsin Broadcasting, Inc., ____ F.C.C.2d ____, 10 Rad. Reg. 2d (P&F) 203 (1954); Westinghouse Broadcasting Co., Inc., ____ F.C.C. ____, 10 Rad. Reg. (P&F) 987 (1954). The mere existence of a creditor/debtor relationship, even if the debt is large, does not in and of itself establish a nexus for the control of one corporation over another. Cf. Morris, Pierce & Pierce, 81 F.C.C.2d 713, 50 Rad. Reg. 2d (P&F) 959 (Rev. Bd. 1981) (creditor/debtor relationship alone does not raise cross-interest question). In point of fact, it was to increase financing of minority controlled acquisitions that the minority exception to the 12-station rule was ostensibly adopted by the Commission. Trinity's financial assistance to NMTV is concrete proof that the Commission's policy objectives are, in fact, being met.

40. The fact that Trinity and NMTV share consulting engineers and attorneys does not compromise NMTV's essential legal separateness from Trinity. In fact, it would go against human nature to allow the corporations to relate to one another and share common principals but require the minority controlled corporation to hire strangers to fulfill its corporate purposes.

41. Trinity and NMTV do, in fact, share common principals. There is no evidence in the record, nor is there any such evidence, that TBN principals, when they are acting on behalf of NMTV, do not act in accordance with the wishes of NMTV's board at properly called meetings or that NMTV's actions are not properly ratified by its board. There is no evidence that the employees of NMTV are given orders or accept and obey orders from Trinity employees who are not also principals of NMTV. There is no evidence that NMTV's books or records are not kept separately from Trinity's, or that its revenues and debts are not separately accounted for, which they are.

42. There is no evidence that Trinity personnel, as opposed to NMTV's principals, hire or fire personnel, make personnel policies or decisions, make programming policies or decisions, or in any other way make decisions or determine policies on behalf of NMTV.

43. Rather, the evidence shows that NMTV is a legally separate corporation from Trinity, and that neither Trinity nor any of its affiliated organizations have any legal right to control NMTV's decisions. Neither Trinity nor any affiliated organization have any financial or other arrangements which would give that corporation any sort of voting power or control of NMTV's corporate decisions. There is no power granted in NMTV's bylaws, or in any written agreements, financing or otherwise,

which affects NMTV's principals' ability to make decisions on behalf of NMTV, to control its corporate, personnel and program policies, or to do or not do any act required of the corporation. There is no evidence that corporate acts undertaken on behalf of NMTV are not undertaken by NMTV's principals or employees.

44. Accordingly, the record shows that despite NMTV's ties with Trinity it is still a "minority controlled" corporation within the meaning of the Commission's multiple ownership rules, specifically, section 73.3555(d)(3)(iii).

D. NMTV's Record of Broadcast Service and the Prompt Construction of Stations Shows that the Public Interest is Best Served by Continuing to Allow it to Qualify Under the Minority Exception as it is Presently Structured and Operated.

45. When NMTV acquired the channel 42, Odessa, Texas construction permit in 1987 it immediately began construction and inaugurated program service within a year. Without NMTV's acquisition of the Odessa CP no new service would have been brought to the Midland-Odessa area. Mr. Roever, the original holder of the authorization, had been totally unable to construct, and had made it clear that he would not be able to proceed with bringing broadcast service to the area.

46. In constructing the Odessa facility, NMTV invested over Six Hundred Fifty Thousand Dollars. It employed five people, and not only created jobs and increased tax revenues, but helped elevate the self-image of the Odessa community. When NMTV sold

KMLM in April 1991 it made no profit, and essentially made the facility available for what it cost to construct. The program service offered by NMTV at KMLM not only included the programming of the Trinity Broadcasting Network, but a significant percentage of public affairs and informational programming.

47. Similarly, when NMTV purchased channel 24 in Portland, the previous owners, Greater Portland Broadcasting Corporation, had been unable to construct for over two years due to a lack of financing, and the inability to obtain required building authorizations. NMTV acquired channel 24 (KNMT) in December 1988, and began broadcast operations 11 months later, on November 16, 1989. Without NMTV's involvement no new service would have been provided to Portland. For this reason alone NMTV has provided a valued public service, since the Commission has long recognized the importance of initiating new broadcast service to the public. See, e.g., Communications Properties, Inc., 92 F.C.C.2d 45, 52 Rad. Reg. 2d (P&F) 981 (Rev. Bd. 1982); Town and Country Radio, Inc., 70 F.C.C.2d 572, 44 Rad. Reg. 2d (P&F) 144 (Rev. Bd. 1978).

48. As with Odessa, in constructing Portland NMTV made a significant investment, over Two Million Dollars. It employs seven full time employees and four part time employees. Three of its full time employees are minorities and two are women. In Portland NMTV took an authorization which the prior holder was

unable to construct and promptly inaugurated program service to the community, provided needed jobs, and increased the local tax base. KNMT provides significant percentages of public affairs and informational programming as well as the programming of the Trinity Broadcasting Network. In addition, KNMT-TV operates a direct relief program, the "His Hand Extended" program, which collects and distributes food, clothing and other supplies for the needy and disadvantaged in the Portland area. NMTV distributes those supplies through area churches and local ministries. Moreover, NMTV provides locally produced programs each week.

49. Based on these factors, NMTV provides a significant public service. Moreover, NMTV does not operate with a commercial purpose or for private gain, and all of its assets are irrevocably dedicated for charitable purposes. Accordingly, based on its significant level of public service, and its proven track record of promptly constructing and activating new broadcast service to the public, NMTV believes it is entitled to continue as an organization qualified in accordance with Commission rule 73.3555(d).

IV. Conclusion

50. NMTV has twice before been approved by the Commission as compliant with Commission rule 73.3555(d). To NMTV's knowledge no other organization or individual has requested an

authorization under that rule. NMTV provides a significant and important service to the public, both in its programming and in its community outreach programs, such as the "His Hand Extended" program. Three of its four directors are individuals from recognized minority groups, and over 42 percent of NMTV's full time employees are minorities. Each of NMTV's directors are accomplished individuals with careers demonstrating a commitment to public and community service.

51. NMTV has fully disclosed the involvement of Dr. Paul Crouch and Mrs. Jane Duff with the Trinity Broadcasting Network.

WHEREFORE, National Minority TV, Inc. hereby respectfully requests that the Commission issue a Declaratory Ruling pursuant to Commission Rule 1.2 advising that it complies with Commission Rule 73.3555(d).

Respectfully submitted,

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